IN THE MATTER OF OMAR BIN SHAIK SALLEH (m) AND HANISAH BINTE SHAIK SALLEH (f), INFANTS; SHAIK SALLEH BIN OMAR JAMMAL v. MARIAMBEE BINTE SHAIK OMAR (m.w.)

[App. Civil Juris. (Murray-Aynsley C.J., Singapore, Pretheroe Ag. C.J., Federation of Malaya and Brown, J.) June 22, 1948]

[Singapore — Civ. App. No. 5 of 1948]

Guardianship of Infants Ordinance (Cap. 50) Ss. 5 and 11 — Whether a Judge in making order of guardianship in the case of Mohammadans should consider Mohammedan Law — Application of Mohammedan Law in the Colony.

This was an appeal from the judgment of Jobling, J. made on Originating Summons, wherein he gave the guardianship of two infants to their mother in preference to their father. The parties in the case were Muslims, the father and mother were divorced and the mother had remarried a stranger. It was contended on appeal that by Mohammedan Law the father would have an absolute right to the guardianship in the circumstances of the present case and that the learned Judge had failed to consider the requirements of Mohammedan Law on the subject of guardianship before making his order.

Held, (1) that there is in this case legislation in general terms regulating the matter, making no exceptions in the case of Muslims and that therefore the Ordinance, in this case the Guardianship of Infants Ordinance (Cap. 50), must be taken to supersede whatever law might have been applied previously; (2) that in exercising his discretion under the Guardianship of Infants Ordinance (Cap. 50) a Judge should bear in mind the customs of the parties, but he should not consider himself bound by them, as then he would not be exercising the discretion given him by the Ordinance.

Cases referred to :—

(1) *Ainan bin Mahmood v. Syed Abu Bakar bin Habib Yusoff and others* (1939) M.L.J. 209.

(2) *Ghouse bin Kader Mustan v. Rex* (1946) M.L.J. 36.

COURT OF APPEAL.

R. L. Eber for the Appellant.

Ahmad Ibrahim (*Sardon Jubir* with him) for the Respondent.

Murray-Aynsley, C. J. : — This appeal raises points of importance as to the application of Mohammedan Law to this Colony.

The present case concerns the guardianship of two infants. It is contended that by Mohammedan Law the father would have an absolute right to the guardianship in circumstances of the present case. The Judge who made the order regarded Cap. 50 as regulating the matter.

It must be remembered that Mohammedan Law as such does not form part of the law of the Colony. Any application of Mohammedan Law apart from Statute can only flow from the provisions of the Charter.

Even in countries in which Mohammedan Law is the law of the country it is within the power of the legislature to abrogate the Mohammedan Law on particular matters or to modify it. An example of this is found in the F.M.S. case of *Ainan bin Mahmood v. Syed Abu Bakar bin Habib Yusoff & Ors.*[1]. In this Colony the legislature has in express terms altered the rules of Mohammedan Law (e.g. section 27 of Cap 57).

In the matter now under consideration we have a legislation in general terms regulating the matter. There is no exception in the case of Moslems. It is therefore clear that the Ordinance supersedes whatever law might have been applied previously.

If necessary I should be prepared to hold that the provision of section 26(2) is of general application and not restricted in its scope by the obviously erroneous heading to Part III of that Ordinance.

In exercising his discretion under Cap. 50 a Judge is no doubt well advised to bear in mind the customs of the parties, but if he were to consider himself bound by them he would not be exercising the discretion given him by the Ordinance.

In my opinion the Judge has taken care in coming to a decision in a difficult case and I see no reason to suppose that the order that he has made is not the best one he could have made in the circumstances.

In my opinion this appeal should be dismissed with costs.

Pretheroe, Ag. C. J. : — I have had the advantage of reading the judgments of Murray-Aynsley C.J. and Brown J., and find myself in agreement with them. Section 5 of the Guardianship of Infants Ordinance provides that the father of an infant shall ordinarily be the guardian of the infant's person and property. A proviso to the section however confers a discretionary power on the Court or a Judge to make such other order as it or he thinks fit. Then section 11 provides that when exercising this discretionary power the Court or a Judge "shall have regard primarily to the welfare of the infant".

It was suggested that the learned Judge failed to exercise the discretion properly because he did not consider the requirements of Mohammadan Law on the subject of guardianship before making his order. I do not know whether the learned Judge did, or did

not, consider Mohammedan Law on the subject, but in his brief notes of the proceedings in Chambers he recorded —

> The children are obviously very fond of their mother as she is of them and they have been in her care since her second divorce some three or four years ago. They are too young not to need a mother's care. It may be better, when the boy is fourteen, that he should have the advantage of his father's position and comparative wealth to set him up in life. The girl I think should remain with her mother but I make the same order in both cases.

These notes satisfy me that the learned Judge regarded the welfare of the infants as the paramount consideration and consequently that he exercised his discretionary power in the manner required by section 11 of the Ordinance.

In my opinion this appeal should be dismissed with costs.

Brown, J. : — The parties to this appeal are Mohammedans who have been twice married and twice divorced, and the present position is that the respondent wife (after being divorced by the appellant for the second time) is now married to another man, by whom she has one child. The appeal is from the Order of Jobling, J. giving the custody of the two infant children to the respondent.

Section 5 of the Guardianship of Infants Ordinance provides that the father shall ordinarily be the guardian of the infant's person and property, but a proviso to that section gives the Judge a discretion to make such order as he thinks fit. The learned Judge, in exercising his discretion in favour of the mother, has given his reasons; but it does not appear from his grounds of decision that he gave any consideration to Mohammedan law. It was not contended on behalf of the appellant that the learned Judge ought to have been bound by Mohammedan law, and the principal ground of this appeal is limited to the contention that Mohammedan law was one of the factors which the learned Judge ought to have taken into account.

In the appellant's memorandum of appeal the second ground reads as follows :—

> That according to Mohammedan law where a divorced woman contracts a second marriage and has issue by such second marriage she is not entitled to the custody of her infant children by her prior husband.

I think it right to point out that if the above statement of the law is intended as a hard-and-fast rule it cannot be accepted without qualification. It seems to me that *Ameer Ali,* in his book on Mohammedan Law at page 257, (5th Edition), makes this quite clear. I think the true position is that just as section 5 of the Guardianship of Infants Ordinance ordinarily gives the custody to the father but allows the Court a discretion, so by the rules of Mohammedan law a woman who marries a stranger is ordinarily deprived of the right to the custody of her infant children by a former marriage, but there too the Court has a discretion to depart from the ordinary rule. In this case if the learned Judge had applied the ordinary rule, whether under the Guardianship of Infants Ordinance or under Mohammedan law, he would have given the father the custody. But believing this to be a case in which he ought to exercise his discretion he gave the custody to the mother and this discretion would have been exercisable as well under Mohammedan law as under the Guardianship of Infants Ordinance. I only mention this because it would appear to me that even if the learned Judge had taken Mohammedan law into account the result in this case would have been the same.

But upon the principle involved in this appeal several authorities were cited to us with a view to shewing that where the law of England is in conflict with the laws of other races the latter have been made to operate in order to modify the former. But in this case we are not concerned with the law of England but with a local enactment. The local legislature has made provision for the guardianship of infants, and we cannot go outside the provisions which it has made. For this reason it seems to me that if, in the case of *Ghouse bin Haji Kader Mustan v. Rex*[2], the Court's attention had been drawn to section 5 of the Guardianship of Infants Ordinance the decision must have been different, because to hold that the girl in that case had no lawful guardian was to ignore section 5 which expressly provides that her father was her lawful guardian. Now in this case the learned Judge acted under the proviso to that section, which gives him an unfettered discretion to depart from the ordinary rule and to make such order as he thinks fit. The proviso neither requires him to take, nor precludes him from taking, any particular matter into consideration in exercising the discretion which it gives him. It would have been open to the learned Judge to take Mohammedan law into account, and I have already indicated what I believe the effect would have been if he had. But his decision was determined by what he considered to be more important considerations, and there is nothing in the statute to prevent him from being guided exclusively by those considerations if he thought fit.

In my opinion this appeal should be dismissed with costs.

Appeal Dismissed.